

## **DATA PROTECTION ACT 1998**

### **SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER**

#### **MONETARY PENALTY NOTICE**

To: House Guard UK Limited

Of: 2 Westover Road, Bournemouth, Dorset, BH1 2BY

1. The Information Commissioner ("Commissioner") has decided to issue House Guard UK Limited ("House Guard") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is being issued because of a serious contravention of regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

#### **Legal framework**

3. House Guard, whose registered office is given above (companies house registration number: 11023674), is the person stated in this notice to have used a public electronic communications service for the purpose of making unsolicited calls for the purposes of direct marketing contrary to regulation 21 of PECR.

4. Regulation 21 applies to the making of unsolicited calls for direct marketing purposes. It means that if a company wants to make calls promoting a product or service to an individual who has a telephone number which is registered with the Telephone Preference Service Ltd ("TPS"), then that individual must have given their consent to that company to receive such calls.

5. Regulation 21 paragraph (1) of PECR provides that:

"(1) A person shall neither use, nor instigate the use of, a public electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where-

- (a) the called line is that of a subscriber who has previously notified the caller that such calls should not for the time being be made on that line; or
- (b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under regulation 26."

6. Regulation 21 paragraphs (2), (3), (4) and (5) provide that:

"(2) A subscriber shall not permit his line to be used in contravention of paragraph (1).

(3) A person shall not be held to have contravened paragraph (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.

- (4) Where a subscriber who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, such calls may be made by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.
- (5) Where a subscriber has given a caller notification pursuant to paragraph (4) in relation to a line of his—
- (a) the subscriber shall be free to withdraw that notification at any time, and
  - (b) where such notification is withdrawn, the caller shall not make such calls on that line.”
7. Under regulation 26 of PECR, the Commissioner is required to maintain a register of numbers allocated to subscribers who have notified them that they do not wish, for the time being, to receive unsolicited calls for direct marketing purposes on those lines. The Telephone Preference Service Limited (“TPS”) is a limited company set up to carry out this role on behalf of the Commissioner. Businesses who wish to carry out direct marketing by telephone can subscribe to the TPS for a fee and receive from them monthly a list of numbers on that register.
8. Section 122(5) of the DPA18 defines direct marketing as “the communication (by whatever means) of any advertising material which is directed to particular individuals”. This definition also applies for the purposes of PECR (see regulation 2(2) PECR & Schedule 19 paragraphs 430 & 432(6) DPA18).

9. Under section 55A (1) of the DPA (as amended by PECR 2011 and the Privacy and Electronic Communications (Amendment) Regulations 2015) the Commissioner may serve a person with a monetary penalty notice if the Commissioner is satisfied that –

“(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person, and

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention.”

10. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties that has been published on the ICO’s website. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.

11. PECR implemented European legislation (Directive 2002/58/EC) aimed at the protection of the individual’s fundamental right to privacy in the electronic communications sector. PECR were amended for the purpose

of giving effect to Directive 2009/136/EC which amended and strengthened the 2002 provisions. The Commissioner approaches the PECR regulations so as to give effect to the Directives.

12. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the Data Protection Act 2018 (see paragraph 58(1) of Part 9, Schedule 20 of that Act).

### **Background to the case**

13. House Guard is an organisation that specialise in masonry protection solutions. These consist of spray-on insulation that is applied to the external of buildings.
14. Between 8 May 2018 and 31 December 2018, the ICO received 91 complaints about unsolicited direct marketing calls made by House Guard. Of those, 58 complaints were made to the TPS, with a further 33 made direct to the Commissioner. All of these complaints were made by individual subscribers who were registered with the TPS.
15. The following are examples of the complaints received by the ICO:
  - "The usual guff about our cavity wall insulation being inadequate and needing to be replaced. As soon as I said we're ex-directory and on the TPS, and the potential fine for junk calls, he hung up. I didn't get a chance to ask about GDPR."
  - "I was busy doing my work and expecting a call from a client when the nuisance call was a rude and annoying interruption."

When I mentioned that I would report her, she asked me to go ahead..”

- “Asked about cavity wall insulation that we had done 5 years ago (no work has been done) then hung up when I asked for the company name..”
  - “Cavity wall insulation. Claimed that they had been asked by the Government to contact people who had installed cavity insulation in the past 10 years.”
  - “Cavity Wall insulation. When I mentioned being TPS Registered and them not cleansing their data etc He told me he had found a loophole and he could call anyone.”
16. On 31 October 2018, the Commissioner wrote to House Guard to explain that she could issue civil monetary penalties up to £500,000 for PECR breaches. The letter informed House Guard that the Commissioner and the TPS had received complaints from individual subscribers in relation to unsolicited calls. House Guard was asked a number of questions about its compliance with PECR.
17. The Commissioner received a response from House Guard explaining that it purchased data from several third party data providers. It had used that data to call individual subscribers to market its products and services. It had not screened the data against the TPS since its purchase as they were assured by its providers that it was “opted in and/or TPS cleansed” and “ready for marketing purposes by telephone”.
18. House Guard further explained in correspondence that it conducted no due diligence when the data was purchased before using it to make

marketing calls other than to screen it against their internal suppression list. It was unable to ascertain from where the data was originally sourced or the actual basis of the consent relied on. House Guard believed that the data had been opted in for generic third party home improvement companies and believed that this was sufficient. It had no contract in place with its providers.

19. The Commissioner's investigation revealed that of 669,966 connected calls made by House Guard within the period of 8 May 2018 and 31 December 2018, 371,958 of these were made to numbers which were registered with the TPS at least 28 days before receiving a call.
20. The Commissioner has made the above findings of fact on the balance of probabilities.
21. The Commissioner has considered whether those facts constitute a contravention of regulation 21 of PECR by House Guard and, if so, whether the conditions of section 55A DPA are satisfied.

### **The contravention**

22. The Commissioner finds that House Guard contravened regulation 21 of PECR.
23. The Commissioner finds that the contravention was as follows:
24. Between 8 May 2018 and 31 December 2018, House Guard used a public telecommunications service for the purpose of making 91 unsolicited calls for direct marketing purposes to subscribers where the number allocated to the subscriber in respect of the line called was a number listed on the register of numbers kept by the Commissioner in

accordance with regulation 26, contrary to regulation 21(1)(b) of PECR; and

25. The Commissioner is also satisfied for the purposes of regulation 21 that these calls were made to subscribers who had registered with the TPS at least 28 days prior to receiving the calls and had not given their prior consent to House Guard to receive calls.
26. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

### **Seriousness of the contravention**

27. The Commissioner is satisfied that the contravention identified above was serious. This is because there have been multiple breaches of regulation 21 by House Guard's activities over a 7 month period, and this led to a significant number of complaints about unsolicited direct marketing calls to the TPS and the Commissioner.
28. In addition, it is reasonable to suppose that the contravention could have been far higher because those who went to the trouble to complain represent only a proportion of those who actually received calls. Between 8 May 2018 and 31 December 2018 House Guard indicated that it had conducted a direct marketing telephone campaign in respect of which they admit that approximately 669,966 were connected to subscribers. Of these calls 371,958 were made to TPS registered numbers, without conducting any due diligence on the data provided to them.
29. The Commissioner is therefore satisfied that condition (a) from section 55A (1) DPA is met.



**Deliberate or negligent contraventions**

30. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that House Guard's actions which constituted that contravention were deliberate actions (even if House Guard did not actually intend thereby to contravene PECR).
31. The Commissioner considers that in this case House Guard did not deliberately contravene regulation 21 of PECR in that sense.
32. The Commissioner has gone on to consider whether the contravention identified above was negligent.
33. First, she has considered whether House Guard knew or ought reasonably to have known that there was a risk that this contravention would occur. She is satisfied that this condition is met, given that House Guard relied heavily on direct marketing due to the nature of its business, and the fact that the issue of unsolicited calls has been widely publicised by the media as being a problem.
34. Each time a complaint is made to the TPS, the TPS inform the company complained about. House Guard would therefore have been aware that complaints were being made by TPS subscribers which should have prompted them to take steps to investigate the reasons for this and to address any deficiencies in their practices.
35. The number of calls made to TPS registered individuals accounts for 55% of the total call volume, this shows a disregard for the legislation surrounding the making of marketing calls. House Guard purchased

data, without knowing how or where it was opted in, did not conduct due diligence on the data and did not screen it against the TPS.

36. The Commissioner has also published detailed guidance for companies carrying out marketing explaining their legal requirements under PECR. This guidance explains the circumstances under which organisations are able to carry out marketing over the phone, by text, by email, by post or by fax. Specifically, it states that live calls must not be made to subscribers who have told an organisation that they do not want to receive calls; or to any number registered with the TPS, unless the subscriber has specifically consented to receive calls.
37. Finally, the Commissioner has gone on to consider whether House Guard failed to take reasonable steps to prevent the contravention. Again, she is satisfied that this condition is met.
38. Reasonable steps in these circumstances would have included ensuring that House Guard had contractual agreements in place with its data providers, could evidence consents relied upon to make marketing calls and screening the data against the TPS register. Organisations buying marketing lists from third parties must make rigorous checks to satisfy themselves that the third party has obtained the personal data it is using fairly and lawfully, and that they have the necessary consent. It is not acceptable to rely on assurances of indirect consent without undertaking proper due diligence. Such due diligence might, for example, include the following:
  - How and when was consent obtained?
  - Who obtained it and in what context?

- Was the information provided clear and intelligible? How was it provided – e.g. behind a link, in a footnote, in a pop-up box, in a clear statement next to the opt-in box?
  - Did it specifically mention live calls, texts, e-mails or automated calls?
  - Did it list organisations by name, by description, or was the consent for disclosure to any third party?
39. Organisations must ensure that consent was validly obtained, that it was reasonably recent and that it clearly extended to them specifically or to organisations fitting their description.
40. Further, the Commissioner's investigation revealed that the company's largest data supplier went into liquidation approximately eighteen months prior to its data purchases. Had House Guard conducted even the most basic due diligence on this supplier they would have discovered this and alerted them to the fact that the data may not be as described.
41. House Guard is unable to provide sufficient evidence that it had undertaken appropriate due diligence in this case. The Commissioner is therefore satisfied that House Guard failed to take reasonable steps to prevent the contravention.
42. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

### **The Commissioner's decision to issue a monetary penalty**

43. The Commissioner has taken into account the following **aggravating features** of this case:

- There has been deliberate action for financial or personal gain. The business was generating leads via marketing calls in order to create profit;
- Advice and guidance has been ignored or not acted upon. This is published on the Commissioner's website and is available via its advice services.
- There appears to be clear evidence of obfuscation on the part of the directors of House Guard which, at times, frustrated the Commissioner's investigation.
- Despite the investigation into breaches of PECR, including receipt of an 'end of investigation' letter which informed House Guard that the Commissioner was considering exercising her regulatory powers in relation to the contravention, a further 127 complaints have since been received by the Commissioner and the TPS.

44. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A(1) DPA have been met in this case. She is also satisfied that the procedural rights under section 55B have been complied with.
45. The latter has included issuing a Notice of Intent, in which the Commissioner set out her preliminary thinking.
46. In reaching her final view, the Commissioner has considered representations received from House Guard on 27 November 2020. Nothing in those representations has persuaded the Commissioner to depart from her preliminary view.

47. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
48. The Commissioner has considered whether, in the circumstances, she should exercise her discretion so as to issue a monetary penalty in this case, and has decided that a monetary penalty is an appropriate and proportionate response to a finding of a serious contravention of regulation 21 by House Guard.
49. The Commissioner has endeavoured to consider the likely impact of a monetary penalty on House Guard. House Guard were invited on 16 December 2020 to provide updated evidence in support of the company's current financial status, particularly in light of the ongoing pandemic. Despite a further request on 4 January 2021, House Guard has failed to provide the Commissioner with the requested evidence.
50. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The making of unsolicited direct marketing calls is a matter of significant public concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. This is an opportunity to reinforce the need for businesses to ensure that they are only telephoning consumers who want to receive these calls.

### **The amount of the penalty**

51. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£150,000 (one hundred and fifty thousand pounds)** is reasonable and proportionate given the

particular facts of the case and the underlying objective in imposing the penalty.

### **Conclusion**

52. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **12 March 2021** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
53. If the Commissioner receives full payment of the monetary penalty by **11 March 2021** the Commissioner will reduce the monetary penalty by 20% to **£120,000 (One hundred and twenty thousand pounds)**. However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.
54. There is a right of appeal to the First-tier Tribunal (Information Rights) against:
  - a) the imposition of the monetary penalty and/or;
  - b) the amount of the penalty specified in the monetary penalty notice.
55. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.
56. Information about appeals is set out in Annex 1.

57. The Commissioner will not take action to enforce a monetary penalty unless:

- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;
- all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
- the period for appealing against the monetary penalty and any variation of it has expired.

58. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 9th day of February 2021

Andy Curry  
Head of Investigations  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

## **ANNEX 1**

### **SECTION 55 A-E OF THE DATA PROTECTION ACT 1998**

#### **RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER**

1. Section 48 of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice or variation notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.

2. If you decide to appeal and if the Tribunal considers:-

a) that the notice against which the appeal is brought is not in accordance with the law; or

b) to the extent that the notice involved an exercise of discretion by the Commissioner, that she ought to have exercised her discretion differently, the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

GRC & GRP Tribunals  
PO Box 9300  
Arnhem House  
31 Waterloo Way  
Leicester  
LE1 8DJ

a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.

b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.



4. The notice of appeal should state:-

- a) your name and address/name and address of your representative (if any);
- b) an address where documents may be sent or delivered to you;
- c) the name and address of the Information Commissioner;
- d) details of the decision to which the proceedings relate;
- e) the result that you are seeking;
- f) the grounds on which you rely;
- g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
- h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time.

5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.

6. The statutory provisions concerning appeals to the First-tier Tribunal (Information Rights) are contained in sections 48 and 49 of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).